UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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JAMES PHAM,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting through the SOCIAL SECURITY ADMINISTRATION and JO ANNE B. BARNHART, individually and as Commissioner of the Social Security Administration,

Defendants.
_____/

NO. CIV. S-05-0246 FCD/GGH

MEMORANDUM AND ORDER

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This matter comes before the court on defendants' motion to dismiss plaintiff Joseph Pham's first amended complaint pursuant

to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[1] In the alternative, defendants move for partial summary judgment pursuant to Rule 56.[2] In addition, defendant Jo Anne B. Barnhart, in her individual capacity, separately moves to dismiss plaintiff's first amended complaint pursuant to Rules 12(b)(5) and 12(b)(6). For the reasons set forth below, defendants' motions to dismiss are GRANTED.[3]

BACKGROUND

Plaintiff worked at the Social Security Administration (the "SSA") for more than 13 years. (Pl.'s First Am. Compl., filed March 31, 2005 ["FAC"], at ¶ 9).[4] During plaintiff's employment, the SSA operated an Employee Suggestion Program (the "ESP"). (Id. at ¶ 12). Under the ESP, employees who volunteer a suggestion that "directly contributes to the efficiency, economy or other improvements to Government operations" may be eligible for an award upon certain conditions if the suggestion is ultimately implemented. (SSA Personnel Manual for Managers, Chapter S451-3: Employee Suggestion Program ["ESP Manual"], at 4, Ex. AAA to FAC). The Central Suggestion Section of the SSA, which is located in Baltimore, Maryland, is responsible for

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[1] All further references to a "Rule" are to the Federal Rules of Civil Procedure.

[2] Because the court grants defendants' motion to dismiss in its entirety, and does not grant plaintiff leave to amend, the court does not consider defendants' alternative motion for summary judgment.

[3] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

[4] Plaintiff's first amended complaint incorporates by reference all exhibits attached to plaintiff's original complaint filed on February 7, 2005. (FAC at Footnote 1).

processing the suggestions submitted through the ESP. (Id. at 10).

During his employment with the SSA, plaintiff alleges that he submitted no fewer than 15 suggestions through the ESP. (FAC at ¶ 14). Plaintiff contends that he was entitled to an award for many of his suggestions which were allegedly adopted by the SSA. (Id. at ¶¶ 15-17). Plaintiff further contends that the SSA "failed and refused" to grant him any part of any award to which he was entitled. (Id. at ¶ 24).

However, contrary to plaintiff's allegations, many of plaintiff's suggestions were not eligible for an award under the ESP, as revealed in the exhibits to plaintiff's first amended complaint.[5] The ESP Manual provides that duplicates of earlier suggestions, suggestions subject to prior management consideration, and other "nonsuggestions," such as ideas relating to normal safety practices, working environments, and minor modifications to computer screens, are not eligible for awards under the ESP. (ESP Manual at 8-9, Ex. AAA to FAC). For example, plaintiff's suggestion regarding "Centralized Updated SSI RMA" was determined ineligible for an award because it was duplicative and subject to prior management consideration. (Evaluation Report, dated March 21, 2003, Ex. OOO to FAC). Similarly, plaintiff's suggestion regarding "Important Websites" was determined ineligible because the web sites were already available to SSA employees. (Evaluation Report, dated March 8,

[5] "When the allegations of the complaint are refuted by an attached document, the Court need not accept the allegations as being true." Durning v. First Boston Corp., 815 F.2d 1265, 1266 (9th Cir. 1987) (quoting Durning v. First Boston Corp., 627 F. Supp. 393, 395 (W.D. Wash. 1986)).

2001, Ex. SSS to FAC). Plaintiff was nonetheless acknowledged for his efforts to identify the web sites in an email to all field offices. (Email from Paul Lindsay, dated February 6, 2001, Ex. TTT to FAC). In addition, plaintiff's suggestion regarding "Phone Appointments for Contagious Diseases" did not meet the criteria of a suggestion because it dealt with normal safety procedures. (Memorandum from Central Suggestion Team, dated October 17, 2001, Ex. XXX to FAC). Many of plaintiff's other suggestions were "nonsuggestions" because they dealt with computer screens, working environments, and normal safety procedures. (ESP Manual at 8-9, Ex. AAA to FAC). Such suggestions by plaintiff included: the addition of a physician directory as a desktop icon, the removal of televisions from public areas and replacement with music, providing soft music to employees, allowing guards to carry pepper spray, and installing metal detectors in some field offices. (FAC at ¶ 19).

In addition to the foregoing, prior to 2002, job-related suggestions were ineligible for an award under the ESP. (Addendum to Personnel Policy Manual, Chapter S451-3, Ex. AAA to FAC). All of plaintiff's suggestions were submitted between 1999 and 2001. (FAC at ¶ 19). Therefore, any of plaintiff's suggestions that related directly to his job as a claims representative at the SSA were ineligible for an award under the SSA.

Despite the fact that many of plaintiff's suggestions were ineligible for an award under the ESP, he alleges that he was "singled-out, disparately treated, and discriminated against by defendants because of his name and Vietnamese heritage" because

he was not granted an award. (Id. at ¶¶ 24, 34). On August 17, 2001, plaintiff filed a compliant with the Equal Employment Opportunity Commission (the "EEOC") seeking redress for defendants' alleged discrimination. (Id. at ¶ 35). The EEOC denied plaintiff's discrimination claim on November 10, 2004. (Id. at ¶ 37).

Plaintiff's first amended complaint includes claims for: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) quasi-contract, (4) promissory estoppel, (5) negligence, (6) racial discrimination in violation of 42 U.S.C. § 1981, and (7) employment discrimination in violation of Title VII, 42 U.S.C. § 2000e-16.

STANDARD

I. Rule 12(b)(1)

The Eleventh Amendment limits the subject matter jurisdiction of the federal courts. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 53-54 (1996). Lack of subject matter jurisdiction may be asserted by either party or the court, *sua sponte*, at any time during the course of an action. Fed. R. Civ. P. 12(b)(1). Once challenged, the burden of establishing a federal court's jurisdiction rests on the party asserting the jurisdiction. See Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 912 (9th Cir. 1990). There are two forms of Rule 12(b)(1) attacks on subject matter jurisdiction: facial and factual attacks. See Thornhill Publ'g Co. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979). In an action such as this, where defendants contend that the lack of federal jurisdiction appears from the "face of the complaint," the

allegations in the complaint are taken as true for the purposes of the motion. Id.

II. Rule 12(b)(6)

On a motion to dismiss, the allegations of the complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322 (1972). The court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. See id.

A complaint need not plead all elements of a prima facie case in order to survive a motion to dismiss. Swierkewicz v. Sorema N.A., 534 U.S. 506, 510-512 (2002) (rejecting a heightened pleading standard for employment discrimination and civil rights cases). Fair notice of the grounds for relief along with a short and plain statement of the claim are all that is required. Id. at 508 (citing Fed. R. Civ. Proc. 8(a)(2)).

Given that the complaint is construed favorably to the pleader, the court may not dismiss the complaint for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957); NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Nevertheless, it is inappropriate to assume that plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." Associated Gen. Contractors of Cal., Inc. v.

California State Council of Carpenters, 459 U.S. 519, 526 (1983). Moreover, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201. See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988); Isuzu Motors Ltd. v. Consumers Union of United States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

ANALYSIS

In response to defendants' motion to dismiss, plaintiff does not oppose the motion with respect to the following claims: (1) quasi-contract; (2) promissory estoppel; and (3) racial discrimination pursuant to 42 U.S.C. § 1981.[6] Plaintiff's remaining claims are: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) negligence; and (4) employment discrimination pursuant to 42 U.S.C. § 2000e-16.

I. Breach of Contract

Defendants contend that the court must dismiss plaintiff's breach of contract claim pursuant to Rule 12(b)(1) because the court lacks subject matter jurisdiction. The court's jurisdiction to adjudicate contract claims against the United

[6] Plaintiff admits that this claim was erroneously brought as a § 1981 claim but asserts it may be brought as a "Bivens" claim. Plaintiff requests leave to amend. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 8).

States is limited to claims that do not exceed $10,000.[7] 28 U.S.C. § 1346(a)(2) (West 2006).

Plaintiff alleges that defendants breached his employment contract by failing and refusing to pay him for the 15 suggestions he made through the SSA's ESP, which resulted in over, allegedly, $445 million in savings to the SSA. (FAC at ¶¶ 14, 18, 44-48). Plaintiff seeks an aggregate of $318,240 for "nonpayment of awards owed" to him under the SSA's ESP. (Id. at 11). Clearly, plaintiff's cumulative demand for defendants' breach of contract far exceeds the court's limited jurisdiction. Therefore, the court lacks jurisdiction to adjudicate plaintiff's breach of contract claim. Accordingly, defendants' motion to dismiss plaintiff's breach of contract claim is GRANTED.[8]

II. Breach of Implied Covenant of Good Faith and Fair Dealing and Negligence

The United States, its agencies, and its employees, may not be sued in the absence of a waiver of sovereign immunity. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994). Congress waived sovereign immunity for certain tort actions when it enacted the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq*. However, a tort claimant may not commence proceedings against the United States in a federal district court without first seeking an administrative resolution by filing a claim with the

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[7] This limit is not violated when a plaintiff "combine[s] a number of claims that are individually less than $10,000 but cumulatively exceed that amount." Baker v. United States, 722 F.2d 517, 518 (9th Cir. 1983).

[8] It is the Court of Federal Claims that has "jurisdiction to render judgment upon any claim against the United States found upon ... express or implied contract with the United States," without any monetary jurisdictional limit. 28 U.S.C. 1491(a)(1) (West 2006).

appropriate federal agency. 28 U.S.C. § 2675(a). The purpose of the FTCA is "to encourage administrative settlement of claims against the United States and thereby to prevent an unnecessary burdening of the courts." Brady v. United States, 211 F.3d 499, 503 (9th Cir. 2000) (citing Jerves v. United States, 966 F.2d 517, 520 (9th Cir. 1992)). The exhaustion of administrative remedies requirement of § 2675(a) is "jurisdictional in nature and must be strictly adhered to." Jerves, 966 F.2d at 521 (citations and quotations omitted).

Defendants argue that plaintiff's claims of negligence and breach of implied covenant of good faith and fair dealing must be dismissed because plaintiff failed to exhaust his administrative remedies as required by the FTCA prior to filing this action. Plaintiff's first amended complaint fails to allege that he filed a claim with the SSA seeking redress for his tort claims as required under the FTCA. Plaintiff, however, argues in his opposition that he exhausted his administrative remedies when he filed a claim with the *EEOC* seeking redress for his alleged employment discrimination. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 8). Plaintiff contends that because these tort claims were "part-and-parcel" of his claim for discrimination, such claims were properly raised before the EEOC and he should be allowed to proceed. (Id.)

Plaintiff's EEOC claim sought redress for employment discrimination, for which the exclusive remedy is provided under Title VII. See Brown v. Gen. Service Admin., 425 U.S. 820, 835 (1976). As such, plaintiff's EEOC claim seeking redress for employment discrimination could not put defendants on notice that

plaintiff planned to seek redress for tort actions, which lie outside the purview of Title VII and exclusively within the FTCA. Consequently, plaintiff failed to exhaust his administrative remedies as to his tort claims. Accordingly, defendants' motion to dismiss as to these claims is GRANTED.

III. Employment Discrimination

Plaintiff alleges that he suffered racial discrimination in violation of Title VII, 42 U.S.C. § 2000e-16, both directly and in the form of a hostile work environment. (FAC at ¶ 91). Title VII provides that "[a]ll *personnel actions* affecting employees ... shall be made free from any discrimination based on race ..." 42 U.S.C. § 2000e-16 (emphasis added). To succeed on a claim for race discrimination under Title VII, plaintiff must demonstrate that (1) he belongs to a suspect class, (2) he suffered an adverse personnel action, and (3) there is a causal link between the adverse action and his class membership. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Trent v. Valley Electric Assn., 41 F.3d 524, 526 (9th Cir. 1994). Therefore, as a threshold matter, plaintiff must identify a *personnel action* in order to state a claim under Title VII.

Generally, Title VII applies to those employment decisions or actions that significantly affect compensation, terms, or conditions of employment. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761-62 (1998). Plaintiff contends that the awards granted pursuant to the ESP are compensatory bonuses and therefore fall within the purview of work-related compensation. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 6). Plaintiff further contends that the denial of such ESP awards is

a personnel action that negatively affects compensation. See Fonseca v. Sysco Food Services of Arizona, Inc., 374 F.3d 840, 847 (9th Cir. 2004) (recognizing that an adverse employment action exists where an employer's action negatively affects its employee's compensation); but see Rabinovitz v. Pena, 89 F.3d 482, 488-89 (7th Cir. 1996) (holding that a loss of a bonus is not an adverse employment action in a case where the employee is not automatically entitled to the bonus).

Contrary to plaintiff's arguments, decisions relating to awards involving employee suggestions are not "personnel actions." Ridenour v. United States, 44 Ct. Fed. Cl. 202, 206 (1999).[9] In Ridenour, the court distinguished between awards related directly to an employee's job performance and awards submitted through the SSA's ESP, the precise program at issue here. Id. The court concluded that an award, with a primary purpose to recognize the merits of an employee, was a personnel action because it affected the employee-employer relationship. Id. The court found that because merit awards "originate with

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[9] While defendants rely heavily on Kipnis v. Baram, 949 F. Supp. 618 (N.D. Ill. 1996), the court finds Kipnis factually distinguishable from the case at hand. In Kipnis, the court was faced with an SSA employee who claimed that he was retaliated against in violation of Title VII because, after he filed an EEOC complaint, he was denied an increase in an award for his suggestion previously submitted and implemented under the ESP. Kipnis, 949 F. Supp. at 624. The court held that because the plaintiff was not automatically entitled to a higher bonus, under Rabinovitz no adverse employment action occurred. Id. at 625. The focus of the Kipnis court's inquiry was whether the government had retaliated against the plaintiff for filing a sexual harassment claim by denying him an additional award. Id. at 621. Unlike the plaintiff in Kipnis, here, plaintiff has not alleged that he was denied an award under the ESP in retaliation for filing his EEOC complaint. Rather, the focus here is whether plaintiff encountered discriminatory conduct related to the terms and conditions of his employment.

management and affect the employee in his status as a worker, they necessarily hold out a potential for supervisory abuse and therefore are included in the list of personnel actions as to which a prohibited personnel practice might occur." Id. In contrast, the primary purpose of accepting a suggestion submitted through the ESP is to improve the SSA's service, which ultimately affects the SSA's relationship with those it serves, not with its employees. Id. Awards under the ESP "offer management no exploitive potential because they are unrelated to the employee's status - they may affect the employee's pocketbook but not the employee's career." Id. Ultimately, the Ridenour court determined that, where an agency-sponsored program invites suggestion and holds out a commitment to an award, the plaintiff's claim, if one at all, lies in implied-in-fact contract. Id. at 207 (concluding that "the program is an invitation to submit offers which, if accepted by the agency, entitle the offeror to recognition that may include a cash award determined in accordance with published guidelines.").

Like Ridenour, where a dispute over the denial of an award under the SSA's ESP was not a "personnel action" for purposes of an action under the Civil Service Reform Act, it follows that such a dispute is not a "personnel action" for purposes of an action under Title VII, which requires an action that significantly affects the compensation, terms, or conditions of employment. See Burlington, 524 U.S. at 761-62. Because the denial of an award under the ESP is not a "personnel action," plaintiff cannot state a claim for racial discrimination under Title VII. Accordingly, defendants' motion to dismiss is

GRANTED.

As to plaintiff's alternative theory of hostile work environment discrimination, plaintiff has not alleged any facts to support that such an environment existed. In order to prevail on a hostile work environment claim, plaintiff must demonstrate that his workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. Brooks v. City of San Mateo, 299 F.3d 917, 923 (9th Cir. 2000). Plaintiff's first amended complaint is devoid of any facts to demonstrate that he was subjected to such an environment. Plaintiff's only allegation to support his hostile work environment claim is a conclusory statement that "[b]ecause of the discriminatory misconduct of defendants they created, or permitted their employees to create, a hostile work environment in which it became impossible fo plaintiff to continue to work ..." (FAC at ¶ 92). Plaintiff's conclusory allegation is insufficient to state a hostile work environment claim under Title VII. Accordingly, defendants' motion to dismiss is GRANTED.[10]

IV. Plaintiff's Request for Leave to Amend

In his opposition to defendants' motion to dismiss, plaintiff requests leave to amend his racial discrimination claim pursuant to 42 U.S.C. § 1981 to state a "Bivens" claim. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 8). Because a pretrial

[10] Although both parties address a disparate impact claim under Title VII, plaintiff did not plead such a claim in his first amended complaint. Therefore, the court does not address the parties' arguments on this issue.

scheduling order was entered on June 22, 2005 (the "Pretrial Order"), Rule 16 governs plaintiff's request for leave to amend. Fed. R. Civ. P. 16; Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992). Under Rule 16, orders entered before the final pretrial conference may be modified only "upon a showing of good cause." Fed. R. Civ. P. 16(b). The good cause requirement of Rule 16 primarily considers the diligence of the party seeking the amendment. When evaluating whether a party was diligent, the Ninth Circuit has determined that "the focus of the inquiry is upon the moving party's reasons for modification. If that party was not diligent, the inquiry should end." Mammoth Recreations, 975 F.2d at 610. Only after the moving party has demonstrated diligence under Rule 16 does the court apply the standard under Rule 15 to determine whether the amendment was proper. See Id. at 608.

Plaintiff proffered no explanation as to why this claim was incorrectly pled other than it was "inadvertent." (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 8). Thus, plaintiff has not demonstrated good cause as to why this court should grant leave to amend as required by Rule 16. Moreover, plaintiff has not demonstrated diligence in correcting this error as nearly nine months have passed between the filing of the Pretrial Order and plaintiff's request for leave to amend in his opposition. Regardless of plaintiff's ability to show good cause and diligence under Rule 16, granting leave to amend would be futile because plaintiff cannot state a claim under Bivens.

In Bivens, the Supreme Court held that government officials may be held personally liable for violations of citizens'

constitutional rights committed under the color of government authority. Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971). However, it is well settled that Bivens did not provide a waiver of sovereign immunity for claims against the United States, its agencies, or its employees who are sued in their official capacities. See 28 U.S.C. § 2679 (West 2006); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471 (1994); Kaiser v. Blue Cross of Cal., 347F.3d 1107 (9th Cir. 2003). Because plaintiff cannot bring an action under Bivens against the United States, the SSA, or defendant Barnhart in her official capacity, granting plaintiff's request for leave to amend would be futile. Accordingly, plaintiff's request for leave to amend his racial discrimination claim under 42 U.S.C. § 1981 to a Bivens claim is DENIED.

V. Defendant Barnhart, In Her Individual Capacity

Defendant Barnhart contends that plaintiff's claims against her must be dismissed pursuant to Rule 12(b)(5) for insufficiency of service of process. Plaintiff filed his complaint on February 7, 2005. Thereafter, plaintiff timely served process on the United States, the SSA, and defendant Barnhart, in her official capacity. (Certificate of Service, filed April 7, 2005). However, to date, plaintiff has not served process upon defendant Barnhart, in her individual capacity, as required by Rules 4(e), 4(i)(2)(B), and 4(m).

Rule 4(i)(2)(B) requires that "[s]ervice on an officer or employee of the United States sued in an individual capacity ... is effected by serving the United States in the manner prescribed by Rule 4(i)(1) *and* by serving the officer or employee in the

manner prescribed by Rule 4(e), (f), or (g)." Rule Fed. R. Civ. P. 4(i)(2)(B) (West 2006) (emphasis added). Rule 4(e) sets forth the methods that may be utilized to serve process upon an individual residing within a judicial district of the United States. Rule 4(m) establishes the time limits for service. Specifically, Rule 4(m) provides:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m)(West 2006).

For the court to extend the time for service, plaintiff must show "good cause" for his failure to serve defendant in a timely fashion. Plaintiff argues that his failure to apply for an extension of time to serve process upon defendant Barnhart was inadvertent. (Pl.'s Opp'n to Def.'s Mot. to Dismiss at 2). However, "inadvertence does not qualify as good cause for failure to comply with Rule 4[(m)]." Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985). Plaintiff failed to provide any other excuse as to why he has waited over one year to properly serve process upon defendant Barnhart.[11] Because plaintiff failed to timely serve

[11] Plaintiff asserts that he withheld service of process out of an abundance of caution because he was waiting for defendant Barnhart to present her points and authorities regarding her standing as a defendant. (Pl.'s Opp'n to Def.'s Mot. to Dismiss at 2). However, plaintiff fails to note that effective service of process is a prerequisite to a court's exercise of personal jurisdiction over a defendant. See Omni Capital Int'l v. Rudolph Wolff, 484 U.S. 97, 104 (1987). Thus, (continued...)

process upon defendant Barnhart, in her individual capacity, and failed to demonstrate good cause for such failure, the court declines to grant plaintiff an extension of time to serve process. Accordingly, defendant's motion to dismiss all claims against her in her individual capacity pursuant to Rule 12(b)(5) is GRANTED.[12]

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss plaintiff's first amended complaint against them is GRANTED. In addition, defendant Barnhart's motion to dismiss plaintiff's claims asserted against her in her individual capacity is GRANTED. Plaintiff's request for leave to amend is DENIED. The Clerk of the Court is directed to close this file.

IT IS SO ORDERED.

DATED: April 25, 2006.

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, JR.
United States District Judge

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[11](...continued)
the question of standing is moot if a court does not have personal jurisdiction over a defendant.

[12] Because the court grants defendant's motion to dismiss pursuant to Rule 12(b)(5), the court need not address defendant's immunity argument.